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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1930
CERTIORARI GRANTED MAY 26, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

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1-2 In United States District Court, Eastern Louisiana

No. 19500

WILLIAM PFAFF, PLAINTIFF

VERSUS

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Petition

Filed Mar. 19, 1929

To the honorable the Judge of the United States District Court for the Eastern District of Louisiana.

The petition of William Pfaff, a resident of the city of New Orleans, Louisiana, respectfully represents that—

I

Plaintiff is and was during all the times herein mentioned a citizen of the United States and of the State of Louisiana, and resides in the city of New Orleans, State of Louisiana.

II

The defendant is and was during all the times herein mentioned the duly appointed, qualified, and acting collector of internal revenue for the District of Louisiana and resides in New Orleans, Louisiana.

III

3 All the acts on the part of the defendant herein complained of were done by him in his official capacity under instructions from his superior officers. There was probable cause for his said acts, and he is entitled to a certificate of probable cause in the event judgment is rendered against him herein.

IV

The plaintiff and his wife, Corinne Henrietta Sievers Pfaff, were married on the 21st day of October, 1891, and have continuously since that date maintained the marriage relation, and have continuously lived in the State of Louisiana, and have been domiciled therein and citizens thereof since prior to their marriage.

V

By their joint efforts plaintiff and his said wife accumulated after their marriage and prior to January 1, 1927, a considerable amount of property which they invested in real estate situated in the city of New Orleans, Louisiana, and stocks in various corporations and other personal property.

VI

All of the property so accumulated and acquired belongs to the community existing between the plaintiff and his wife under the laws of the State of Louisiana, and each of them is the owner of one-half (½) of said property under said laws.

VII

During the year 1927 plaintiff was an officer and employee of Searcy & Pfaff, Ltd., Union Homestead Association, American Bank & Trust Company, and International Trade Exhibition, devoting the major amount of his time to the affairs of the first two corporations, and in the year 1927 said corporations paid to plaintiff for services rendered by him in that year sums aggregating twenty-seven thousand and twenty-five ($27,025) dollars, which sums so paid accrued to the community existing between the plaintiff and his wife,
4 and became and was the property of each of them in the proportion of one-half (½) to each of them.

VIII

In addition to the salaries mentioned in the foregoing paragraph, there was received by the plaintiff and his wife during the year 1927 the following income, revenue, and profit from community property which was vested in them jointly and was the property of each of them in the proportion of one-half (½) to each, to wit:

Rent and royalties from the community real estate	$11,232.65
Dividends on community stocks	3,142.25
	$14,374.90

IX

The plaintiff's entire gross income during the year 1927 consisted of one-half (½) of the sum of the items mentioned in the preceding two paragraphs, i. e., one-half (½) of forty-one thousand three hundred and ninety-nine and 90/100 ($41,399.90) dollars, or twenty thousand six hundred and ninety-nine and 95/100 ($20,699.95) dollars.

X

The plaintiff paid during 1927 one-half (½) of the following sums, to wit:

Losses on sales of community stocks	$854.68
Interest paid	7,660.09
Taxes paid	148.37
Charitable contributions	2,210.50
Total	10,873.64

The amount so paid by plaintiff, being one-half of ten thousand eight hundred and seventy-three and 64/100 ($10,873.64) dollars, or five thousand four hundred and thirty-six and 82/100
5 ($5,436.82) dollars, was an allowable and proper deduction in the calculation of net income under the revenue act of 1926.

XI

There were filed with the defendant herein within the period required by law separate income-tax returns for the year 1927 for the plaintiff and his wife, plaintiff's income being correctly reported in his return and his wife's income being correctly reported in her return, each of them reporting one-half (½) of the entire amount of income received by the community as aforesaid, and each deducting therefrom one-half (½) of the losses, expenses, and allowances above itemized, and each reported and returned as net taxable income the remaining sum. The gross income returned and reported by petitioner was twenty thousand two hundred and seventy-two and 61/100 ($20,272.61) dollars; the total deductions and allowances returned and reported were five thousand and nine and 48/100 ($5,009.48) dollars, leaving a balance of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars as the net income of the plaintiff. The gross and net incomes of the plaintiff's wife were, at plaintiff's instance and with his approval, reported and returned by her in corresponding figures.

XII

The returns thus made by the plaintiff and by his wife and the method adopted by each of them in calculating his and her gross and net incomes were in strict accord with the decisions of the Treasury Department of the United States then published and in force.

XIII

The tax liability of the plaintiff upon the income so reported by him at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum
6 of seventeen hundred and fifty ($1,750) dollars, and plaintiff's claim to earned income in the sum of thirteen thousand five

hundred and twelve and 50/100 ($13,512.50) dollars was the sum of three hundred and forty-one and 55/100 ($341.55) dollars, which was paid in full at the time required by law. The tax liability of plaintiff's said wife upon the income so reported by her at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of seventeen hundred and fifty ($1,750) dollars and her claim to earned income in the sum of five thousand ($5,000) dollars was the sum of four hundred and thirty and 17/100 ($430.17) dollars, which was likewise paid in full at the time required by law.

XIV

After the plaintiff had filed his income-tax return for the year 1927 as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the return made by plaintiff was incorrect and that the amount of taxes paid by him was insufficient in that, according to the contention of said Commissioner of Internal Revenue, all of the income of the community, both that reported by the plaintiff and that reported by his wife, should have been reported and returned by the plaintiff and the tax calculated at the rates provided for by the revenue act of 1926 upon a net income of thirty thousand five hundred and twenty-six and 26/100 ($30,526.26) dollars instead of two net incomes of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars each. The commissioner notified under date of August 1st, 1928, the plaintiff by registered mail, in accordance with section 274 of the revenue act of 1926, that he had made this determination and that he proposed to assess against the plaintiff a deficiency in income tax for the year 1927 for account thereof amounting to thirteen hundred and forty-eight and 50/100 ($1,348.50) dollars.

7

XV

In order to expedite a judicial decision of the controversy, plaintiff waived an appeal the United States Board of Tax Appeals, and on August 20, 1928, paid under protest to the defendant at New Orleans, Louisiana, the additional taxes claimed in the sum of thirteen hundred and forty-eight and 50/100 ($1,348.50) dollars, with interest in the sum of thirty-two and 51/100 ($32.51) dollars, making a total of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars, which had been assessed against the plaintiff by the Commissioner of Internal Revenue and certified to the defendant for collection.

XVI

Thereafter plaintiff filed with the defendant in the manner provided by law a claim for the refund of said sum so paid, which claim was based upon the facts herein set forth, which claim was rejected by the Commissioner of Internal Revenue on August 21, 1928.

XVII

The income reported by plaintiff for the year 1927 comprised his entire share in the community income under the laws of the State of Louisiana and all the income accruing or belonging to him for that year.

XVIII

Plaintiff is not subject to taxation under the revenue act of 1926 upon his wife's one-half (½) of the community income, and the action of the Commissioner of Internal Revenue in adding to the plaintiff's income as reported by him his wife's share in community income is improper, erroneous, and illegal, as was and is the assessment and collection of the additional sum of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars exacted by the defendant of the plaintiff.

8

XIX

The effect and result of the acts of the defendant in demanding and collecting from him a tax upon his income plus the income of his wife is to levy and collect a tax upon something not within the meaning of the term "income" as it is used in the sixteenth amendment to the Constitution of the United States.

XX

The exaction and collection of said tax is in violation of the third clause of section 2 and the fourth clause of section 9, of Article I, of the Constitution of the United States.

XXI

The exaction and collection of said additional tax is in violation of section 8 of Article I and in violation of the fifth amendment to the Constitution of the United States.

XXII

The revenue act of 1926 does not authorize or require the taxing of plaintiff upon the income of his wife as the Commissioner of Internal Revenue has undertaken to do, but if said revenue act could be construed as providing or requiring such taxation, then said act would be and is as to this plaintiff unconstitutional and void in that—

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of Mrs. Pfaff;

(b) It requires the collection from plaintiff at progressive rates of a tax based not upon his income alone but upon the combined income of plaintiff and Mrs. Pfaff, thereby not only obliging plaintiff to pay

upon an income not his own but obliging him to pay at a higher rate upon his own income;

(c) It forbids and prohibits plaintiff and Mrs. Pfaff from filing separate income tax returns including therein the income only belonging to and received by them, respectively, which right is allowed under the revenue act to citizens of other States;

(d) It levies a direct tax upon the real estate and invested personal property owned by plaintiff and Mrs. Pfaff and the fruits and revenues therefrom, which direct tax is not upon income as the term is used in the sixteenth amendment to the Constitution, and which is not apportioned among the several States upon the basis of any census or enumeration, and it is also arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed against and collected from plaintiff at progressive rates the combined incomes of himself and Mrs. Pfaff instead of the income only of plaintiff;

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law, and in all of which respects and particulars, as well as in other respects and particulars, it violates the third clause of section 2, the first clause of section 8, the fourth clause of section 9, all of Article I of the Constitution of the United States, as well as the fifth and sixteenth amendments to the Constitution of the United States.

XXIII

By reason of the premises plaintiff is entitled to have and recover from the defendant the taxes and interest wrongfully exacted of him in the sum of thirteen hundred and eighty-one and 01/100 ($1381.01) dollars, as hereinabove set out, with interest thereon as required by law.

Wherefore plaintiff prays that the defendant, Jacob O. Bender, be served with a copy of this petition and be duly cited to appear and answer hereto, and after due proceedings there be judgment in favor of plaintiff and against defendant in the full sum of thirteen hundred and eighty-one and 01/100 ($1381.01) dollars, together with interest thereon from the date of payment at the rate of six per cent (6%) per annum, and all costs of suit; and there be issued by the court a certificate of probable cause for the conduct of the defendant in his official capacity as aforesaid. Plaintiff further prays for general and equitable relief.

(Sig.) SPENCER, GIDIERE, PHELPS & DUNBAR.
(Sig.) MONROE & LEMANN.
(Sig.) WM. PFAFF.

[*Duly sworn to by William Pfaff; jurat omitted in printing.*]

[Citation in usual form showing service on Jacob O. Bender, collector, filed Mar. 25, 1929, omitted in printing.]

12–13 In United States District Court

[Title omitted.]

Answer

Filed Mar. 22, 1929

To the honorable the Judge of the United States District Court for the Eastern District of Louisiana:

Now into court comes Jacob O. Bender,. collector of internal revenue for the district of Louisiana, and for answer to plaintiff's petition with respect says:

I

Defendant admits article one of plaintiff's petition.

II

Defendant admits article two of plaintiff's petition.

III

Defendant admits article three of plaintiff's petition.

IV

Defendant admits article four of plaintiff's petition.

V

Defendant admits article five of plaintiff's petition.

14 VI

Defendant denies that each, the plaintiff and his wife, is the owner of one-half (½) of the community property or the income therefrom and otherwise admits article six.

VII

Defendant denies that each, the plaintiff and his wife, is the owner of one-half (½) of said community property or the income therefrom and otherwise admits article seven.

VIII

Defendant denies that each, the plaintiff and his wife, was the owner of one-half (½) of said community property or the income therefrom and otherwise admits article eight.

IX

Defendant denies article nine of plaintiff's petition.

X

Defendant denies article ten of plaintiff's petition and states that plaintiff paid out of community funds the entire amount mentioned in said article, and not one-half thereof as alleged.

XI

Defendant denies that plaintiff's income was correctly reported in his return and denies that his wife's income was correctly reported in her return, and otherwise admits article eleven.

XII

Defendant denies article twelve of plaintiff's petition.

XIII

Defendant admits article thirteen of plaintiff's petition.

XIV

Defendant admits article fourteen of plaintiff's petition.

XV

Defendant admits article fifteen of plaintiff's petition.

15 XVI

Defendant admits article sixteen of plaintiff's petition.

XVII

Defendant denies article seventeen of plaintiff's petition.

XVIII

Defendant denies article eighteen of plaintiff's petition.

XIX

Defendant denies article nineteen of plaintiff's petition.

XX

Defendant denies article twenty of plaintiff's petition.

XXI

Defendant denies article twenty-one of plaintiff's petition.

XXII

Defendant denies article twenty-two of plaintiff's petition.

XXIII

Defendant denies article twenty-three of plaintiff's petition.

XXIV

And in further answer to plaintiff's petition defendant alleges:

(a) That the title to the real estate and to the stock and other personal property mentioned in article five (5) of plaintiff's petition at all times stood in the name of the plaintiff, the husband.

(b) That at all times the plaintiff husband had control over and disposition of the earnings, income and revenue referred to in articles seven (7) and eight (8) of plaintiff's petition.

16 (c) That the tax paid by his wife as alleged in plaintiff's petition has been treated by the Commissioner of Internal Revenue as an overpayment and has been or will be in due course refunded to her.

Whereupon defendant prays that there be judgment in his favor and against plaintiff and that there be further judgment in his favor for all costs in his behalf incurred. And the defendant further prays that in the event this honorable court should render judgment in favor of the plaintiff then in that event this court do release this defendant from any personal liability in accordance with R. S., sec. 989, and defendant prays for all further general and equitable relief.

(Signed) JACOB O. BENDER.

(Signed T. M. LOGAN BRUNS
Assistant United States Attorney,
Of Counsel for Defendant.

[*Duly sworn to by Jacob O. Bender; jurat omitted in printing.*]

17 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Stipulation and agreed statement of facts

Filed Oct. 25, 1929

The parties to this proceeding, each acting by and through their attorneys of record duly authorized, hereby stipulate and agree as follows:

I

That a jury trial is waived, and the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes. (Secs. 773 and 875, U. S. C.)

II

Both parties admit and agree that the following is a true statement of the facts in this case, and this case shall be submitted upon the same as an agreed and admitted statement of facts.

III

(a) William Pfaff, the plaintiff, since his birth has been and now is a citizen of the United States and of the State of Louisiana,
18 and has resided and now resides in the parish of Orleans, city of New Orleans, State of Louisiana, in the collection district for the collection of internal revenue of the United States known as the District of Louisiana.

(b) Jacob O. Bender, the defendant, is the duly appointed and qualified collector of internal revenue of the United States for the District of Louisiana, and resides in the parish of Orleans, city of New Orleans, State of Louisiana, which is in the said district of the United States known as the District of Louisiana.

(c) The parish of Orleans, State of Louisiana, is in the district for the collection of internal revenue of the United States known as the Louisiana District, and also is in the judicial district of the United States known as the Eastern District of Louisiana, New Orleans division.

(d) The taxes and interest sued for in this proceeding were paid by the plaintiff to the defendant in his official capacity, and defendant's action in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officers duly appointed qualified, and acting. The defendant in so demanding such taxes and interest had probable cause therefor, and in the event of a decision in this case adverse to him he is entitled to a certificate of probable cause.

(e) The plaintiff and his wife, Corinne Henrietta Sievers Pfaff, were married on the 21st day of October, 1891, and have continuously since that date maintained the marriage relation, and have continuously lived and resided in the State of Louisiana, and have been domiciled therein since prior to their marriage, and the said Corinne Henrietta Sievers Pfaff has been throughout such period and is now a citizen of the United States and of the State of Louisiana.

(f) Neither the plaintiff nor his said wife at the time of
19 their marriage had any property or pecuniary rights, and neither of them has since acquired any paraphernal or separate property.

(g) Plaintiff and his said wife accumulated after their marriage, and prior to January 1st, 1927, a considerable amount of property, which was invested in real estate situated in the city of New Orleans, Louisiana, and stocks in various corporations and other personal property. All of the property so accumulated and acquired, as well as the increase and income derived therefrom, belongs to the community partnership existing between the plaintiff and his wife under the laws of the State of Louisiana. The title to all of the property so accumulated and acquired stood during the period of ownership in the name of the plaintiff.

(h) There was received by the community partnership during the year 1927 the following income, revenue, and profit from the property mentioned in subdivision (g) of this stipulation to wit:

Rent and royalties from the community real estate	$11,232.65
Dividends on community stocks	3,142.25
	$14,374.90

(i) During the year 1927 plaintiff was an officer and employee of Searcy & Pfaff, Ltd., Union Homestead Association, American Bank & Trust Company, and International Trade Exhibition, devoting the major amount of his time to the affairs of the first two corporations, and in the year 1927 said corporations paid to plaintiff for services rendered by him in that year sums aggregating twenty-seven thousand and twenty-five ($27,025.00) dollars.

(j) Plaintiff and his wife had no income for the year 1927 taxable under the revenue laws of the United States other than the income above described, consisting of the sum of the items mentioned in the two preceding paragraphs, *i. e.*, forty-one thousand and three hundred ninety-nine & 90/100 ($41,399.90) dollars.

(k) The plaintiff paid from the community partnership funds for the year 1927 the following sums, which constitute allowable and proper deductions from gross income in the calculation of net income under the revenue act of 1926, to wit:

Losses on sales of community stocks	$854.68
Interest paid	7,660.09
Taxes paid	148.37
Charitable contributions	2,210.50
	$10,873.64

(l) There were filed with the defendant herein within the period required by law, at plaintiff's instance and with his approval, separate income-tax returns for the year 1927 for the plaintiff and his wife, in accordance with the rulings made by the Bureau of Internal Revenue then on file and in effect. The returns were on Form 1040, furnished to taxpayers by the Bureau of Internal Revenue, and the defendant was the proper collector with whom the same should be filed. Copies of the returns filed by the plaintiff and his wife are hereto attached and made a part hereof, and marked, respectively, Exhibits "A" and "B" for identification herewith.

In each return there was included, under proper headings, one-half of the income received by the community partnership hereinabove described, from which there was subtracted one-half of the losses, expenses, and allowances as deductions, as hereinabove itemized, and each reported and returned as net taxable income the remaining sum. The gross income returned and reported by petitioner was twenty thousand, two hundred and seventy-two and 61/100 ($20,272.61) dollars; the total deductions and allowances re-
21 turned and reported were five thousand and nine and 48/100 ($5,009.48) dollars, leaving a balance of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars as the net income of the plaintiff. The gross and net incomes of the plaintiff's wife were, at plaintiff's instance and with his approval, reported and returned by her in corresponding figures.

(m) The tax liability of the plaintiff upon the income so reported by him at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum of seventeen hundred and fifty ($1750.00) dollars and plaintiff's claim to earned income in the sum of thirteen thousand five hundred and twelve and 50/100 ($13,512.50) dollars, was the sum of three hundred forty-one and 55/100 ($341.55) dollars, which plaintiff paid out of community funds at the time required by law. The tax upon the income so reported on the separate return filed by the plaintiff's said wife at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of seventeen hundred and fifty ($1750.00) dollars and her claim to earned income in the sum of five thousand ($5,000.00) dollars, was the sum of four hundred thirty and 17/100 ($430.17) dollars, which was similarly paid in full at the time required by law.

The income so reported by the plaintiff in his return and the income reported in the separate return of his said wife in the year 1927 covered their interest in community property income under the laws of the State of Louisiana. If plaintiff and his wife were entitled to divided community income less deductions, exemptions, and credits, as above described, the plaintiff's return was correct and the tax liability of the plaintiff thereon was as stated on his return.

If plaintiff and his wife are not entitled to divide commu-
22 nity income less the deductions, exemptions, and credits above described, it is expressly stipulated and agreed that the plaintiff is not entitled to a refund in this proceeding for any portion of the amount paid by him for which this suit is brought.

(n) Upon auditing the aforesaid tax return of the plaintiff for the year 1927 the Commissioner of Internal Revenue determined that said return of the plaintiff was incorrect and that the amount of taxes paid by him was insufficient in that, according to the determination of the commissioner, the plaintiff should have reported all of said income and claimed all of said deductions in plaintiff's return, and the tax should have been calculated and paid at the rates provided in the revenue act of 1926 upon a net income of thirty thousand five

hundred and twenty-six and 26/100 ($30,526.26) dollars, less the personal exemption and income credit provided by law, instead of upon two net incomes each comprising one-half of said amount, or fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars each.

And upon auditing the aforesaid tax returns of the plaintiff's wife for the year 1927 the Commissioner of Internal Revenue determined that said returns of said wife were incorrect in that, according to the determination of the commissioner, the plaintiff's wife should have reported none of the community income and no tax should have been paid by her thereon, and the entire amount so paid by plaintiff's wife should be refunded to her.

(o) The commissioner notified plaintiff by registered mail, under date of August 1st, 1928, in accordance with section 274 of the revenue act of 1926, that he had made this determination, and that he proposed to assess against the plaintiff a deficiency in income tax for the year 1927 for account thereof amounting to thirteen hundred and forty-eight and 50/100 ($1348.50) dollars.

(p) Plaintiff, without prejudice to his rights, waived an ap-
23 peal to the United States Board of Tax Appeals, and on August 20th, 1928, paid under protest to the defendant at New Orleans, Louisiana, the additional taxes claimed in the sum of thirteen hundred and forty-eight and 50/100 ($1348.50) dollars, with interest in the sum of thirty-two and 51/100 ($32.51) dollars, making a total of thirteen hundred and eighty-one ($1381.00) dollars, which sum had been assessed against the plaintiff by the Commissioner of Internal Revenue and certified to the defendant for collection.

(q) Thereafter, plaintiff filed with the defendant, in the manner provided by law, a claim for the refund of said sum so paid, which claim was based upon the facts herein set forth, which claim was rejected by the Commissioner of Internal Revenue on August 23, 1928, whereupon this suit was instituted.

IV

The plaintiff has complied with all of the conditions precedent and other formal requirements of the statutes and rules relating to his right to institute and prosecute this suit in the manner and upon the grounds alleged in his pleadings, and all informalities, if any, are hereby waived. The defendant and other officers of the United States have complied with all formal requirements of the statutes and regulations in making the deficiency assessments, in collecting the same, and in rejecting plaintiff's claim for the refund.

V

Subject to the right of either party to object to the consideration of the same as irrelevant or immaterial and without limitation upon the power of the court to take judicial notice, it is further agreed

that the records of the Congress of the United States disclose the following proceedings:

A–1. The revenue act of 1921 as introduced into the House
24 of Representatives, as reported by the Ways and Means Committee of the House and as passed by the House, contained the following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

A–2. The revenue act of 1921, as reported by the Finance Committee of the Senate, substituted for the above quoted clause the following:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

A–3. The Finance Committee, in making its report to the Senate, discussed the foregoing provisions as follows at page 14 of the report:

"Under an opinion of the Attorney General residents of States having a community property law enjoy marked advantage over residents of other States. Income, which in other States is taxed as a unit to the husband, is divided between husband and wife in States having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

A–4. The bill as passed by the Senate eliminated the clause above quoted and as finally enacted contained no specific reference to community income.

25 B–1. Committee Print No. 1 of the revenue act of 1924, as introduced into the Sixty-eighth Congress and filed on December 17, 1923, was entitled as follows:

"The Revenue act of 1924, Containing Proposed Amendments to the Existing Law Suggested by the Secretary of the Treasury."

and at page 58 of the bill there was included, described as new matter, the following provision:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

B–2. The bill as reported by the Ways and Means Committee of the House of Representatives eliminated the foregoing clause and contained no reference to community income.

C–1. While the Senate was considering the revenue act of 1926 the following amendment to page 12 of the bill was offered by Senator Wesley M. Jones, of the State of Washington:

"The liability of any taxpayer under any internal revenue law shall be determined, unless such taxpayer otherwise consents or requests, in accordance with the Treasury Decisions, Opinions of the Attorney General, and regulations made by the commissioner or the secretary or by the commissioner with the approval of the secretary in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision, the term 'return' means, in the case of a return which has been amended, the return as finally amended."

26 C–2. On February 12, 1926, the Senate, without a record vote, adopted the foregoing amendment, the same appearing in the bill as adopted by the Senate as section 1213. In conference there was substituted for this provision a clause in the language of and which became section 1212 of the revenue act of 1926.

VI

Nothing in this stipulation shall be construed as a limitation upon the right of the court to take judicial notice of any other matters that under the law may properly be made the subject of such judicial notice.

VII

This agreement and stipulation shall, upon its execution, be filed in this cause and become a part of the record therein.

In witness whereof the attorneys of record of the respective parties have executed this agreement the 12th day of October, 1929.

(Sgd.) T. M. LOGAN BRUNS,
Asst. U. S. Atty.
" CHAS. E. DUNBAR, JR.,
" MONTE M. LEMANN,
Attys. for Plaintiff.

27 In United States District Court

[Title omitted.]

Motion for judgment

Filed Oct. 12, 1929

Now comes Jacob O. Bender, made defendant herein through T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and W. H. Trigg, special attorney, Bureau of Internal Revenue, of counsel for defendant, and after conclusion of all the evidence, a stipulation of facts having been previously filed herein and now being made a part of this motion, respectfully moves the court for judgment in favor of the defendant for the reason that there is no substantial evidence to support a judgment in favor of

the plaintiff and against the defendant and that the defendant is entitled to judgment against the plaintiff dismissing the said plaintiff's petition and for the recovery from said plaintiff of the costs herein expended.

(Signed) T. M. LOGAN BRUNS,
Assistant United States Attorney,
Of Counsel for Defendant.

(Signed) W. H. TRIGG,
Of Counsel for Defendant.

28 In United States District Court

No. 19,500. At law

WILLIAM PFAFF, PLAINTIFF
VERSUS
JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Charles E. Dunbar, Monte M. Lemann, New Orleans, Louisiana, for the plaintiff; T. M. Logan Bruns, assistant U. S. attorney, for the defendant; W. H. Trigg, special attorney, Bureau of Internal Revenue, New Orleans, La.

Opinion

Filed Dec. 6, 1929

DAWKINS, J.: This suit is for the recovery of $1,348.50 paid under protest as the result of a deficiency assessment on plaintiff's income return for 1927. Plaintiff and his wife lived under the regime of the matrimonial community established by the Louisiana law, and accordingly made separate returns, each for one-half of the total income of the year in question. They were married in this State and have continued to reside here at all times. All of their revenues were from community sources. The Government refused to
29 accept payment upon the basis claimed, but required the plaintiff to pay the taxes upon the whole as his individual income, with the result that the amount was increased by the sum which he now seeks to recover.

The jury has been waived and the matter submitted upon an agreed statement of facts, which now presents for decision only a question of law; that is, as to whether under the law of Louisiana the plaintiff and his wife were joint owners of the income and entitled to make returns as such for the taxes levied by the revenue act of 1926. It, therefore, becomes necessary to review the statutory provisions of the State as well as the interpretation placed thereon by its court of last resort to determine the extent of the interest of the wife in the community property and income. These are to be found in the Louisiana Civil Code, arts. 2399 to 2437, inclusive, which primarily

have their origin in the Spanish law. I quote some of the most pertinent provisions as follows:

"ART. 2399. Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

"ART. 2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attend to, and not the person who made the purchase. But damages resulting from personal injuries to
30 the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; 'provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.' (As amended and reenacted by act 68 of 1902.)

"ART. 2404. The husband is the head and master of the partnership of community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent and permission of his wife.

"He can make no conveyances inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the childen of the marriage.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

"ART. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

31 "ART. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has

been thus brought in marriage by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

"ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil or the results of labor, belongs to the conjugal partnership, if there exists a community of gains."

It is thus seen that in the absence of a prenuptial agreement that there shall be no community, the law conclusively presumes its existence and not only does the property acquired through the joint and individual efforts of the spouses, regardless of the name in which it is taken, thereafter fall into the partnership, but also all profits and revenues arising from whatever may be brought into the marriage or may be received by either during its existence, except such as comes to the wife from her paraphernal property separately administered by her. While the relation is referred to as a partnership, it does not possess all of the characteristics of a commercial firm, but has some features resembling that status. So long as there exists no occasion for invoking by the wife of certain remedial provisions for her protection, the husband manages and disposes of the community property and income without
32 having to obtain the consent of his wife, subject to the limitations hereinafter discussed. However, he can "make no conveyance inter vivos by a gratuitous title of the immovables, nor of a whole or a quota of the movables, unless it be for the establishment of the children of the marriage. Nevertheless, he may dispose of the movables by a gratuitous and particular title to the benefit of all persons." However, if he does so in fraud of the wife, she may at his death "have her action" against his heirs for reimbursement of her half thereof.

When the marriage is dissolved, either by death or divorce, the property, consisting both of what has been earned and acquired during its existence and of the profits from their separate estates, save those which arise from the paraphernal property of the wife separately administered by her, is divided into two equal parts, which vests, either in the heirs of the deceased and the survivor, respectively, or the spouses, as the case may be, in absolute ownership. It is an interest of which the wife and her heirs can not be deprived by the husband. But they are protected from his mismanagement in that if the community is involved, they may accept the same under the law with what is called "benefit of inventory." This means that there must be an administration of the estate under the probate powers of the court, resulting in a marshaling of the property or assets and payment of the community debts, and a distribution of the residue, if any, one-half to each of the beneficial interests. In this way the wife or her heirs escape personal liability for the debts of the community, in event it proves involvent. The Supreme Court of Louisiana has construed these provisions of the code as vesting in the wife during marriage the title to one-half of

the community property and not as constituting a mere expectancy. See Philipps vs. Philipps, 160 La. 813, and authorities therein reviewed and analyzed. It is there pointed out that the interest does not come to the wife solely as a result of the dissolution of the marriage, but exists at all times, subject only to the administration of the husband; that it is not in the nature of an inheritance, and neither she nor her heirs can be deprived thereof by any act of the husband. In Cole vs. Cole's Executors, 7 Martin (N. S.) 71, the supreme court of the State, through Justice Porter, pointed out the difference between the views expressed by the French commentators as to the nature of the wife's interest in community property, and the law of Louisiana, and in doing so said:

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"But it is not for us to deny, or even doubt the correctness of their conclusions in relation to the law of France. It is sufficient that it is not the same as ours, and that the difference is marked on this very point. The Napoleon Code does not contain the provision found in the code of Louisiana, that if the husband alienates, during coverture, the acquets and gains, with the intention of injuring the wife, she may, at his decease bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our code. And the exercise of such a right, does appear to us utterly opposed to the principle, that the wife has no interest in the property, until the community is dissolved; for if she has not, how can she maintain an action to set aside the alienation? Who ever heard of a suit, the sole basis of which was, that the hopes and expectations of the plaintiff had been disappointed and defeated by the acts of the defendant?"

See also Theall vs. Theall, 7 La. 226, wherein it was held that the will of the husband conveying "one-half of all (his property) to my wife" transmitted only one-half of his half of the community, and not the other half, for the reason that the wife took the latter in her own right and hence could not be conveyed by the husband, who did not own it. To the same effect see Ramsey vs. Beck, 151 La. 190.

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The State Supreme Court has also consistently held that the surviving spouse does not have to pay the State inheritance tax upon the half of the community property falling to her at its dissolution. Succession of Marsal, 118 La. 212. On the other hand, where the husband or wife wills his or her half of the community to the survivor, the inheritance tax is due as in case of any other legacy. Succession of May, 120 La. 692; Succession of Popp, 146 La. 464. The debts incurred during marriage must be paid out of community assets, but those of either spouse contracted before marriage have to be borne by their separate interests. If the latter be discharged with community funds, then on the dissolution of the community the one for whose benefit the payment was made must account therefor or be charged with the same in the settlement of the partnership. Childers vs. Johnson, 6 La. Ann. 634.

The Supreme Court of the United States in cases arising from some of the other States having laws establishing matrimonial communities similar to those of Louisiana has had occasion to consider the nature of the interest of the wife therein, and while the question here raised was not involved, i. e., the ownership of one-half of the community income, nevertheless it has uniformly held (except as to the State of California where the statutory provisions are materially different) that the interest of the wife is a vested one and not a mere expectancy. See Warburton vs. White, 176 U. S. 484; Arnett vs. Reade, 220 U. S. 311. Similar holdings are to be found in the decisions of the Federal district and appellate courts. Beck vs. Miller, 8 Fed. (2) 797; Bacon vs. Hopkins (D. C., Texas), 27 Fed. (2) 140; Rucker vs. Blair (C. C. A., Wash.), 32 Fed. (2) 916. The interest is of such a nature that if it were sought to be divested by a
35 statute seeking to abolish the community, the same would probably be unconstitutional as destroying a vested right. Dixon vs. Dixon's Executors, 4 La. 188; Arnett vs. Reade, supra.

I am of the opinion, therefore, that the contention that the wife has a vested interest in community property and not a mere expectancy is sustained both by the statutory provisions of the State as construed by its supreme court, as well as the decisions of the Supreme and other Federal courts.

The remaining issue is as to whether or not the character of control exercised by the husband over community income in this State is such as to constitute him the owner thereof for the purposes of Federal income taxation while the community remains undissolved. The extent of the husband's control is found in art. 2404 of the code, which declares that he is the "head and master of the partnership of community gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent or permission of his wife." Standing alone this expression would indicate that he could dispose of community property, including revenues, which is the same thing as income, only for value, which value, whether in property or otherwise so acquired, would in turn vest in the community. However, the succeeding paragraphs of this article modify the preceding ones to some extent by declaring specifically that he "can make no conveyance inter vivos by a gratuitous title of the immovables of the community, nor of the whole, or a quota of the movables unless it be for the establishment of the children of the marriage." Of course a "conveyance inter vivos by gratuitous title" means a donation to take effect while he is yet alive and the community, therefore, still extant, and the article by this language clearly deprives him of the power to the extent indicated of giving away the community real estate except for the estab-
36 lishment of the children of the marriage. It also prevents him from giving in a similar manner "the whole or a quota of the movables" except for the same purpose. The third paragraph then goes a step further and declares that he "may dispose of the movable effects by a gratuitous and particular title to the benefit of

all persons." Movables mentioned in this article mean the same thing as personal property under the common law or all kinds of property other than real estate. While no case has been cited interpreting these apparently conflicting provisions, it would seem that a reasonable construction would be that while he can neither dispose of the whole of the movables nor a considerable portion thereof by donation to take effect during his lifetime and the existence of the community, he may nevertheless so dispose of particular objects or things of that class by particular title to whomsoever he may choose. At the same time, all of the powers thus given, regardless of extent, are further circumscribed and limited by the last paragraph which gives the wife a right of action against his heirs at his death for the recovery of the value of such property when the same has been conveyed to defraud or injure her by fraudulently depriving her of her interest in the community. The last provision, that is prohibiting the fraudulent disposal by the husband of the immovables, was not found in the French or Napoleonic Code but was derived from the Spanish law. Dixon vs. Dixon's Heirs, 4 La. 188 (1924). But the Louisiana law goes still further and it is not necessary that the community should be dissolved before she can protect herself against such fraud of the husband, but she may do so in an action for separation from bed and board or for a separation of property. Smallwood vs. Pratt, 3rd Rob. 132; Gastauer vs. Gastauer, 131 La. 1.

The jurisprudence of Louisiana is uniformly to the effect that not only may the wife sue for dissolution of the community and
37 separation of property where her paraphernal or dotal interests are in jeopardy, but she may do so also for the purpose of safeguarding her future earnings arising from her own industry whenever the husband is guilty of mismanagement or other faults which render the same necessary. Such a right of action is available to her without the necessity of coupling therewith a suit for separation from bed and board or divorce. When such a judgment of separation of property and dissolution of the community is rendered, the court will also decree a division of the community property then owned by them jointly. The case of Gastauer vs. Gastauer, 131 La., p. 1, is directly in point. There the wife sued her husband for a separation of property and dissolution of the community and sought to have herself declared the owner of certain real property which had been acquired in her name during the community but which was later conveyed to a homestead association to secure a loan and subscription to certain shares of stock in the company. She also sought to enjoin the homestead company from reconveying it to her husband on the claim that it was her separate property. The lower court gave judgment for the defendant, but on appeal this was reversed and the property was held to belong to the community, which the court dissolved and decreed the property to belong in equal portions to the spouses. I quote a part of the opinion and decree expressing the views of that court and showing the disposition which it made of the matter, including a division of the costs equally between the litigants:

"(3) The right of a wife to demand a separation of property is not dependent upon the actual possession by her of separate property, or upon the existence of any claim against her husband for the reimbursement of paraphernal funds. It is enough that she show that the habits and circumstances of her husband render such separation necessary in order to enable her to preserve for her
38 family the earning that she may derive from her separate industry and talent; and that proof plaintiff has made. Davock vs. Darcy, 6 Rob. 342; Penn vs. Crockett, 7 La. Ann. 343; Wolf & Clark vs. Lowry, 10 La. Ann. 272; Webb vs. Bell, 24 La. Ann. 75; Chaffe & Sons vs. Watts, 37 La. Ann. 324; Brown & Learned vs. Smythe, 40 La. Ann. 325, 40 South. 869; Jones vs. Jones, 119 La. 687, 44 South. 429.

"It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of plaintiff and against George Gastauer, her husband, decreeing a separation of property between them. It is further decreed that, as between said litigants and the Union Homestead Association and as between said litigants inter sese, all the rights apparently accruing to the plaintiff, Sophie Gastauer, otherwise Mrs. George Gastauer, under the resolution of said association of February 3, 1902, and by reason of her holdings of the stock of said association, be decreed to have been vested in the community lately existing between plaintiff and her said husband, and to be now vested in the members of said late community, share and share alike. It is further decreed that the costs of this litigation be paid in equal proportions by the plaintiff and her said husband."

Not only has she such a right, but the State code of procedure supplements this with an express provision for a writ of injunction to prevent his disposing of the community property pending such an action. Art. 298 directs, among other grounds, that the writ "must be granted and directed against the defendant * * *."

"6. When a woman has sued her husband for a separation of property or for a separation from bed and board and fears
39 that he will during the pendency of the suit dispose to her prejudice of the property either held in the community or on which she has a privilege for her dotal rights."

The judgment of separation of property is effective from the date of filing of the petition. R. C. C. 2432. The wife may require an inventory of all the property in possession of the husband, and from the date on which the action is brought "it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time shall be null if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife." R. C. C. 149, 150. During the pendency of such action he is not entitled to the revenues of common property, but must account therefor. Dillon vs. Dillon, 35 Ann. 92; McClelland

vs. Gasquet, 122 La. 241; Hill vs. Hill, 115 La. 490; Crochet vs. Dugas, 126 La. 285; Williams vs. Goss, 43 Ann. 868. Irrespective of the grounds of separation or by which of the spouses the community property was produced, on its dissolution he or she is entitled to receive one-half thereof. Brooks vs. House, 168 La. 542. Any sums spent out of community funds upon the separate property or in payment of debts anterior to the marriage must be accounted for at dissolution and charged to the separate estates of the spouses (R. C. C. 2403), and even if the same were paid out of revenues of the separate property of the husband which falls into the community, he must likewise account therefor. Glenn vs. Elam, 3 Ann. 611. See also Dillon vs. Freville, 129 La. 1005; Succession of Casey, 130 La. 743. Until the amendment of the code some fifteen years ago the community interest of a deceased husband or wife descended to their heirs, including collaterals, but since that time, in the absence of descendants or ascendants, the interest is now inherited by the survivor. R. C. C. 915; Bossier vs. Herwig, 112 La. 539.

40 The relation of the husband to the community and its income is more in the nature of a statutory agency, giving him considerable latitude in its management and the application of its funds, hedged about with legal safeguards permitting the wife to protect her interest and to put an end to the agency upon the happening of the circumstances mentioned in the code, and compelling him to account therefor to such extent and in such manner as excludes the idea of that ownership which is necessary to support his liability for taxes in the case of the ordinary taxpayer. Warburton vs. White, supra. The husband may manage the community as a prudent administrator and is not responsible for mistakes of judgment, but he can not dispose of its effects fraudulently without being accountable therefor. And the wife may put an end to this management whenever her interest is in jeopardy, request a division, and compel him or his heirs to account for his fraud.

The revenue act of 1926 (sec. 210–a) under which the taxes herein involved were collected provides for the levy at certain rates "upon the net income of every individual * * *"; and section 223–b declares that the incomes of husband and wife may be made by returns separately or jointly. It would seem, therefore, if the income arising from the community belongs in the proportion of one-half to each, then they are entitled to report the same as individuals. The relation as established by the Louisiana law appears more analogous to that of a partnership for taxing purposes. It is referred to as such in many articles of the code. R. C. C. 2399, 2402, 2406, 2430. With respect to the return and taxation of an interest in a partnership, sec. 218–a provides:

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his dis-

41 tributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

If the income (one-half of the whole) in this case was the property of the wife, I think it should have been assessed and the tax paid by her, for it will not be assumed that Congress intended to tax one individual for the income of another. I find nothing in the revenue law purporting to tax the husband as the head of the community for the whole, regardless of its ownership.

In the case of United States vs. Robbins, 269 U. S. 315, the Supreme Court had under consideration the same question involved here, except that it required an interpretation of the community laws of California. It was there pointed out the law of that State, as interpreted by its supreme court, gives to the wife a mere hope or expectancy in the community property prior to the dissolution of the marriage. Roberts vs. Wehmoyer, 191 Cal. 601. But the court, through Justice Holmes, went further in the Robbins case than to pitch it upon the proposition that the wife during marriage did not own any of the community property or its income and took occasion to say that even if "the wife had an interest in the community income that Congress could tax if it so minded it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. Garrozi vs. Dastas, 204 U. S. 64." The case thus cited by the Supreme Court arose in Porto Rico and involved the right of the wife after divorce to compel the husband to account for sums found to have been unnecessarily and extravagantly expended in trips to Europe. Justice White, in deciding that the wife could not exact such an account, took occasion to say:

42 "Besides, when it is considered that the ancient Spanish law and the law as formulated in the code of 1889, or in the Porto Rican code of 1902, *confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that code.*" (Italics by the writer of this opinion.)

He then cites a decision of the Supreme Court of Louisiana (Guice vs. Lawrence, 2 La. Ann. 226) as pointing out the similarity of the law of community in Louisiana, the Code Napoleon, and the Spanish law. Justice White also adverts to the later provision of the Porto Rican code, which requires the concurrence of the wife in disposing of the real property of the community, but states that this limitation of power in one direction as to real property had the opposite effect contended by the wife as placing a restriction upon the husband's powers as to the whole community property, for the logical reason that having found it necessary to limit his rights upon real property it followed that his powers as to the movables and funds, having

been excluded from the limitation, were not so restricted. However, there are, under the Louisiana law, both in its codal provisions and as now settled by the decisions of its courts, two decided differences between what the Supreme Court found to be the law of Porto Rico in the Garrozi case, to wit, with respect to the right of the wife to put an end to the community before dissolution of the marriage and as to her relief against the fraudulent disposition of the common property. It is as well settled under the Louisiana jurisprudence as anything can be that the wife during marriage may have the community dissolved whenever the husband has been guilty of

43 mismanagement, his affairs are in disorder, he is dissipated, or has engaged in speculation, and this whether she has or had any paraphernal or dotal property, but merely for the protection of future earnings from her own industry. Davock vs. Darcy, 6 Rob. 342 (1844); Jones vs. Morgan, 6 Ann. 630 (1851); Wolfe & Clark vs. Lowry, 10 Ann. 272 (1855); Mock vs. Kennedy, 11 Ann. 525 (1856); Webb vs. Bell, 24 Ann. 75 (1872); Vickers vs. Block, 31 Ann. 672 (1879); Chaffe vs. Watts, 37 Ann. 324 (1885); Brown vs. Smyth, 40 Ann. 325 (1888); Walmsley vs. Theus, 107 La. 417 (1902); Gastauer vs. Gastauer, 131 La., 1 (1912). Then, as heretofore noted, the last paragraph of art. 2404 of the Louisiana code, makes the husband's estate, including his interest in the community as well as his heirs, liable for the value of her half of the community property which he "has sold * * * or otherwise disposed of * * * by fraud, to injure his wife," in an "action against the heirs." So that while the Garrosi case may have been sound authority in support of the decision of U. S. vs. Robbins, it does not follow that it will sustain a similar conclusion when construing the law of Louisiana. For, in the latter case, Justice Holmes found "he (the husband) may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery the wife has no redress." This is not true in Louisiana. Here, if the wife chooses, she may bring her action at any time when the husband's conduct put her rights in jeopardy and have a dissolution of the community and division of its property, including its funds and income. Gastauer vs. Gastauer, supra.

When the question of whether, in the States of the Union having community laws, husbands and wives might make separate returns of community income first came up, the Attorney General of the United States, in a well-considered opinion, advised the Treasury Department that in all of them save California, this could be done under the revenue laws. That construction was adopted and con-

44 tinued until recently, when this case and others were provoked to obtain a ruling of the courts upon the question in States other than California, after decision in U. S. vs. Robbins. From time to time, efforts have been made in Congress, no doubt at the inspiration of taxpayers in the other States, to have the revenue acts specifically deny the right to make such returns or to permit

the same course to be followed in all of the States, but when the disadvantages of the community system otherwise were weighed against the privilege here claimed these efforts have failed, and the legislative department has permitted the situation to continue in so far as any express statutory change is concerned just as it was, with full knowledge of the views of the Attorney General and the course pursued by the Revenue Department. While this is not conclusive, still it is entitled to great weight as both an administrative and legislative interpretation of the law.

If it should happen in a particular case, for reasons heretofore held sufficient by the courts of Louisiana, that a wife would obtain a dissolution of the community and division of its assets, say at the beginning of a particular year, when the operations of the previous year had produced a substantial income, to require a return alone by the husband of the whole, would be to make both pay a tax upon something which they did not own or possess when making the return at the usual period on March 15th. In other words, the fiction of the community partnership would have ended and its property been divided, but nevertheless, if the Government's contention is correct, the husband would still have to pay upon the whole as if it were his own, when both actually and legally he would not have received it.

My conclusion is that the income of the community belongs jointly to the husband and wife and that the revenue act of 1926 does not require that it be assessed to the husband alone, but each may make a separate return as was done in this case. It follows that plaintiff should have judgment as prayed for. Proper decree may be presented.

Done and signed in chambers at Shreveport, Louisiana, on this the 5th day of December, A. D. 1929.

(Sig.) BEN C. DAWKINS,
U. S. D. J.

IN UNITED STATES DISTRICT COURT

No. 19.500

WILLIAM PFAFF, PLAINTIFF

VERSUS

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

Dec. 9, 1929

This cause heretofore came on for trial before the court without the intervention of a jury, a jury trial having been waived and all

matters at issue of fact as well as law having been submitted to the court without the intervention of a jury by a written stipula-
46 tion made by the parties and filed with the clerk; and the court having heard the pleadings, the evidence, and the arguments of counsel, being of the opinion that the plaintiff is entitled to the relief prayed for, for the reasons assigned in a written opinion signed under date of December 5, 1929;

It is ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, William Pfaff, and against the defendant, Jacob O. Bender, collector of internal revenue, in the full sum of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars, together with interest thereon from the date of payment—namely, August 20, 1928—at the rate of six per cent (6%) per annum and all costs of this suit. The court hereby certifies that the taxes and interest sued for in this proceeding were paid by the plaintiff to the defendant, Jacob O. Bender, collector of internal revenue in defendant's official capacity aforesaid; that the action of the defendant in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officer duly appointed, qualified, and acting; that there was probable cause for his action in demanding and collecting such taxes; and that he is entitled to a certificate herein for probable cause, which is hereby given.

Judgment rendered December 9, 1929.

Judgment signed December 9, 1929.

(Signed) BEN C. DAWKINS,
Judge.

47 In United States District Court

[Title omitted.]

Order allowing time to prepare and file bills of exceptions

Entered Dec. 9, 1929

On motion of T. M. Logan Bruns, assistant United States attorney, who on behalf of the defendant hereby duly excepts to the opinion of the court and judgment handed down herein, and on suggesting to the court that in order that the rights of the defendant may be preserved it will be necessary that a period of at least 15 days' time be allowed for the settling and filing of bills of exception herein;

It is ordered by the court that all the rights of the defendant herein be, and they are hereby, preserved, and accordingly that said defendant be allowed fifteen days as time in which to settle and file bills of exception herein.

48 In United States District Court

[Title omitted.]

Petition for appeal and order allowing same

Filed Dec. 23, 1929

To the honorable judge of said court:

Jacob O. Bender, collector of internal revenue, defendant in the above entitled and numbered case, in which a written opinion was rendered and a certificate of probable cause issued, feeling himself aggrieved by the final judgment of this court and the opinion to which it refers, hereby claims an appeal from said judgment and from the whole thereof, with stay of execution under said judgment, to the United States Circuit Court of Appeals for the Fifth Circuit and prays that said appeal may be allowed and the record in this cause duly transcribed and certified to the said United States Circuit Court for the Fifth Circuit, to be heard therein upon the pleadings and proof in this case to the end that the said judgment may be reversed.

(Sgd.) E. E. TALBOT,
United States Attorney.
(Sgd.) T. M. LOGAN BRUNS.
Assistant United States Attorney.

49 Order

The appeal hereinabove prayed for is hereby granted, with stay of execution under said judgment, returnable to the United States Circuit Court of Appeals for the Fifth Circuit on the 10th day of January, 1929.

(Sgd.) BEN C. DAWKINS,
Judge.

December 23, 1929.
Service accepted, citation waived, and all rights reserved.
(Sgd.) MONTE M. LEMANN.
(Sgd.) CHARLES E. DUNBAR, Jr.

In United States District Court

[Title omitted.]

Assignment of errors

Filed Dec. 23, 1929

In the above styled and numbered cause comes now the defendant and respectfully shows that this honorable court has committed

error herein to his prejudice in rejecting his demands, and
50 assign as specifications of such error that the court erred in the following particulars:

In overrruling the motion of defendant for judgment and in not sustaining the same.

Wherefore, defendant prays that the opinion of the court and judgment herein be reversed.

(Sgd.) E. E. TALBOT,
United States Attorney.
(Sgd.) T. M. BURNS,
Assistant United States Attorney.

In United States District Court

[Title omitted.]

Bill of exceptions and order settling same

Filed Dec. 23 1929

Be it remembered that this cause having been regularly
51 assigned for trial was called for trial before the Honorable Ben C. Dawkins, sitting especially in the Eastern District of Louisiana, on the twelfth day of October, 1929, both parties, plaintiff and defendant, announcing ready for trial.

The jury was waived by written stipulation between counsel as provided by section 649, United States Revised Statutes, and the case submitted to the court on an agreed stipulation of facts, said stipulations being contained in one document duly filed as part of the record in this cause.

The trial was then proceeded with, and at the conclusion of argument defendant filed a motion for judgment, made part hereof.

Thereafter, on December 5, 1929, the court handed down a written opinion, which is made a part of the record herein, denying the contentions of defendant, overruling his motion for judgment, and ordering the entry of a judgment in favor of plaintiff as prayed for, said judgment being duly signed the 9th day of December, 1929.

To which rulings and judgment of the court counsel for defendant timely excepted and reserved his bill of exceptions, making the stipulation introduced a part thereof, which bill of exceptions is hereby settled and allowed on this 23 day of December, 1929.

(Sgd.) BEN C. DAWKINS,
United States District Court.

Approved:
(Sgd.) MONTE M. LEMANN,
(Sgd.) CHARLES E. DUNBAR, JR.,
Counsel for Plaintiff.

52 In United States District Court

[Title omitted.]

Pracipe for transcript

Filed Dec. 23, 1929

The clerk will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

(1) Plaintiff's petition.
(2) Citation and return thereon.
(3) Defendant's answer.
(4) Stipulation waiving jury and stipulating facts.
(5) Defendant's motion for judgment.
(6) Opinion of the district judge.
(7) Final judgment.
(8) Defendant's timely exception to opinion and judgment of District Court and reservation of time to file bill of exceptions.
(9) Bill of exceptions.
(10) Assignment of errors.
(11) Petition and order of appeal.
(12) Citation waived.
(13) This præcipe; and
(14) Certificate of clerk.

(Sgd.) T. M. LOGAN BRUNS,
Assistant U. S. Attorney,
Of Counsel for Defendant.

53 Approved:
(Sgd.) MONTE M. LEMANN,
(Sgd.) CHARLES E. DUNBAR, JR.,
Attorneys for Plaintiff.

December 26, 1929, clerk's office.

[Clerk's certificate to foregoing transcript omitted in printing.]

54 [Minute entry of argument and submission, Feb. 19, 1930, omitted in printing.]

55 In United States Circuit Court of Appeals, Fifth Circuit

No. 5809

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

WILLIAM PFAFF, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Louisiana

Edmond E. Talbot, U. S. attorney, John W. Harrell, asst. U. S. attorney, C. M. Charest, Gen. Counsel, Bureau of Int. Rev., T H.

Lewis, jr., spec. atty., Bureau of Int. Rev., for appellant: Monte M. Lemann, Chas. E. Dunbar, jr. (Spencer, Gidiere, Phelps & Dunbar; Monroe & Lemann on the brief), for appellee.

Before BRYAN and FOSTER, Circuit Judges, and SIBLEY, District Judge

FOSTER, Circuit Judge:

Opinion

Filed Feb. 28, 1930

In this case there is no dispute as to the facts. Appellee, William Pfaff, and his wife are citizens of Louisiana, domiciled in New Orleans, with their matrimonial community under the laws of that State existing. For the year 1927 they made separate returns for
56 Federal taxes, each for one-half of the community income of $30,526.26. Neither had any separate income. The Commissioner of Internal Revenue held that the entire income of the community should have been returned by the husband and determined a deficiency of $1,348.56, which was paid under protest, and this suit followed. The jury was waived and the district court, for reasons given in a well-considered opinion (Pfaff vs. Bender, F. (2d)), which exhaustively reviews the statutes and jurisprudence, both State and Federal, pertinent to the issues presented, held in favor of appellee on the ground that the wife in Louisiana has a vested interest in the community property entitling her to file a separate return for one-half of the community income. We need not review the opinion of the district court and the authorities therein cited. We refer to it with approval, however, as authority for such general statements of the law of Louisiana as are hereinafter made.

Appellant contends that the vested interest of the wife is immaterial, as the husband has dominion and control of the community and should be taxed for the whole of the community income. He relies for reversal upon the decision of the Supreme Court in the case of U. S. vs. Robbins et al., 269 U. S. 315. Whether this decision is controlling is really the only question presented. Of course, considered practically, this involves the amount of taxes to be paid. If the husband must return the whole income, the surtaxes will be greater.

Prior to the decision in the U. S. vs. Robbins, supra, following
57 an opinion by Attorney General Palmer, rendered in 1921 (32 Op. Atty. Genl. 435), construing the revenue act of 1918, spouses in Louisiana and other States having community property laws, except California, were permitted by the Treasury Department to make separate returns of the community income and pay taxes accordingly.

From time to time, as new revenue laws were considered and adopted, attempts were made to incorporate clauses to avoid the effect of Attorney General Palmer's holding, but without avail.

The revenue act of 1926, under which this case arises, is practically identical with previous acts in its provisions as to returns and assessment. It taxes incomes of individuals and permits a wife to make a separate return of her income. In the case of partnerships each member may return his share of the firm's profit as his individual income.

In the case of U. S. vs. Robbins, supra, the Supreme Court held, as did Attorney General Palmer, that in California a wife has merely an expectancy during the existence of marriage with no vested interest in the community property and is not entitled to make a separate return. Had the opinion stopped there the existing rule of the Treasury Department would not have been disturbed in the least. Unfortunately, for the peace of mind of the taxpayer, the concluding paragraph of the opinion went further. The court said:

58 "But the question before us is with regard to the power and intent of the revenue act of February 24, 1919, c. 18, Title II, Part II, pars. 210, 211, 40 Stat. 1057, 1062. Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See Garrezi v. Dastas, 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he, who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, par. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Par. 219. See Regulations 65, Art. 341."

It is not seriously disputed that the status of the wife in Louisiana is as pointed out by the opinion of the District Court, but the argument is made, based upon the above-quoted language, that the tax is to be assessed against the husband who has dominion and control over the fund without regard to the State law fixing the vested interest of the wife. This is too broad a construction to place on the opinion. It is obvious that what the Supreme Court said was intended to apply only to conditions similar to those existing in the State of California, as shown in the case under consideration.

In California the wife has no vested interest during the existence of the marriage and therefore no income to return. In Louisiana the wife's interest in the community property is vested at all times and does not require the dissolution of the marriage to come into existence.

59 In California the husband has absolute dominion and control over the community property equivalent to full ownership. If he wastes it in debauchery, the wife has no redress. In Louisiana the husband has dominion and control over the community property, but he must manage it as a prudent administrator. If he wastes it in debauchery, the wife has her remedy to secure a separation of property without disturbing the marriage. If he fraudulently diverts it to his own personal estate, both he and his heirs may be made to account to the wife.

In Louisiana if the husband dies the wife takes by virtue of her ownership and not by inheritance. She pays no inheritance taxes, State or Federal, on her one-half of the community property.

In Louisiana the earnings of the wife enter into the community, Civil Code, art. 2402, and debts contracted by her must be acquitted out of the common fund, Civil Code, art. 240. It is true the wife can not contract without the authority of the husband, express or implied, but a tax is not a debt created by contract. It is created by law and a duty exists to pay it. No authorization by the husband is required for its validity. The wife may stand in judgment with her husband's authorization, Civil Code, art. 121. If he refuses to authorize, the judge may do so, Civil Code, art. 124.

In many respects the matrimonial community existing in Louisiana is similar to a commercial partnership created by contract. It frequently happens that partnerships are created in which one partner has the absolute control and dominion of the affairs of the firm, the sole activities of the other partner consisting in furnishing

60 part of the capital. It could hardly be said that because one partner has the dominion and control of the partnership business that the distributive share of the profits going to the other partner could be added to the individual income of the managing partner for the purpose of computing taxes.

There is slight difference, if any, in Louisiana between the authority and liability of the husband in community and that of a trustee or guardian. While they are required to make returns for their charges, no one would say that the income of the ward or cestui qui trust should be added to the individual income of the guardian or trustee for the purpose of computing his taxes.

We think the decision in U. S. vs. Robbins should be held to refer only to cases where the conditions are similar to those existing in California and that it is not applicable to community property states such as Louisiana.

Affirmed.

61 In United States Circuit Court of Appeals, Fifth Circuit

No. 5809

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE

VERSUS

WILLIAM PFAFF

Judgment

Feb. 28, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

62 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Filed March 15, 1930

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed until May 28, 1930, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that before May 28, 1930, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or after May 28, 1930, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 15th day of March, 1930.

(Signed) N. P. BRYAN,
United States Circuit Judge.

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 In Supreme Court of the United States

Order allowing certiorari

Filed May 26, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 20th next, immediately following case No. 821, Hopkins, Collector of Internal Revenue, vs. Bacon.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34954. United States Circuit Court of Appeals, Fifth Circuit. Term No. 86. Jacob O. Bender, collector of internal revenue, petitioner, vs. William Pfaff. Petition for writ of certiorari and exhibit thereto. Filed April 17, 1930. File No. 34954.

U. S. GOVERNMENT PRINTING OFFICE: 1930